IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 249 OF 2001

Dr. Dnyaneshwer Purshottam
Kudalkar, Chief Medical Officer,
New Mangalore Port Trust,
Door No.2, 9th Street,
M.P.T. Colony, Panambur,
Mangalore.
(Registered Address) ..... Petitioner

V e r s u s

1. Union of India,
   through the Secretary
   Ministry of Shipping,
   (Ports Wing), PE-1,
   Section, New Delhi.

2. Mormugao Port Trust,
   through its Chairman
   with office at Mormugoa Port,
   Headland, Sada, Goa.

3. Dr. Premanand D. Azgaonkar,
   Chief Medical Officer,
   Mormugao Port Trust
   with office at M.P.T.
   Hospital, Vasco da Gama,
   Goa.

(Registered Addresses) ..... Respondents

Shri J. E. Coelho pereira, Senior Advocate with Shri J. Godinho, Advocate for the Petitioner.

Shri C. A. Ferreira, Asst. Solicitor General for Respondent No. 1.

Shri V. B. Nadkarni, Senior Advocate with Mr. Y. V. Nadkarni, Advocate for Respondent no.2.

Shri A. N. S. Nadkarni, with Mr. H. D. Naik, Advocates for the Respondent No. 3.

CORAM : A. P. LAVANDE
N. A. BRITTO, JJ.

DATE : 5th April, 2006.

JUDGMENT *(Per N. A. BRITTO, J)*

The petitioner, a Chief Medical Officer, working with New Mangalore Port Trust in the pay scale of Rs.14500-18700, has challenged the selection and appointment by respondent no.1, of respondent no.3 as Chief Medical Officer with respondent no.2 in the pay scale of Rs.17500-22300.

2. The petitioner has challenged the said appointment of respondent no.3 as arbitrary, illegal and violative of the petitioner's rights guaranteed under Articles 14 and 16 of the Constitution of India, as

respondent no.3 has been appointed and/or selected to the said post not being qualified under the rules in force.

3. We have heard the learned Senior Counsel Shri Coelho Pereira and Shri Nadkarni on behalf of the petitioner and respondent no.2 respectively, learned Asst. Solicitor General Shri Ferreira and learned Counsel Shri Nadkarni on behalf of respondent nos.1 and 3 respectively, at length.

4. There is no dispute that respondent no.3 had been working with respondent no.2 as a Surgeon from 23.04.1983 in the pay scale of Rs.13000-18250. The petitioner was earlier working with the respondent no.2 as a Asst. Medical Officer from 27.05.1976 in the pay scale of Rs.9100-15100 and as a Medical Officer from 16.03.1999 till 31.12.2000, in the pay scale of Rs.13000-18250 and as Chief Medical Officer of the said New Mangalore Port Trust from 01.01.2001. As per the Regulations issued by the Central Government, by notification dated 10.02.2000, known as Mormugoa Port Trust (Recruitment of Heads of Departments)(Amendment) Regulations 2000, the method of recruitment for the post of Chief Medical Officer with respondent no.2 was by promotion, failing which, by

transfer/deputation, failing both, by direct recruitment. There is no dispute that when the said Regulations of 2000 were in force, only respondent no.3 was eligible to be considered for the post of Chief Medical Officer with respondent no.2.

5. The respondent no.2 on or about 31.01.2001, vide Board's resolution no. 115 of the same date, proposed to change the eligibility conditions for the post of Chief Medical Officer and proposed to the respondent no.1 that the post of Chief Medical Officer be filled in by Promotion from Officers holding analogous posts with five years regular service in the post equivalent to Medical Officer/Specialist in any discipline or above in any Major Port Trust, failing which by transfer or deputation of Officers holding analogous posts in Government/Semi Government Organisation, Public Sector Undertaking or Autonomous bodies with five years regular service in the post. It also stipulated that the selection to the post of Chief Medical Officer will be by merit for which bench mark in the overall grading in the ACR should not be below "*very good*". The period of deputation should not ordinarily exceed three years. The word "*Analogous post*" meant that the post of which the duties and level of responsibilities and/or the pay ranges are comparable to those of the post to which the

selection was to be made.

6. Pursuant thereto, respondent no.2 sent a letter dated 11.05.2001 to the Chairmen of all Major Port Trusts on the subject of filling up the post of Chief Medical Officer with respondent no.2 by transfer/deputation and informed that the said post of Chief Medical Officer with respondent no.2 in the pay scale of Rs.17500-22300, would be falling vacant as the incumbent had opted for voluntarily retirement under the Voluntary Retirement Scheme and that the existing Recruitment Rules of Chief Medical Officer, have been amended by the respondent no.2 to adopt a composite method of recruitment for selection of Officers by promotion/transfer/deputation from Major Port Trusts and also communicated the eligibility conditions which were proposed for filling up the post of Chief Medical Officer, as approved by the Board on 31.01.2001. It will not be out of context to reproduce at this stage the eligibility criteria as approved by respondent no.2/Board and communicated to the Chairmen of all Port Trust vide letter dated 11.05.2001.

7. Chief Medical Officer:

(1) Educational and other ESSENTIAL: Should be a

	qualifications required for direct recruitment.	medical graduate of a Recognized University with Post Graduate degree diploma in any branch of medical science. Experience: Should have atleast 15 years experience including at least 5 years administrative experience in any large hospital belonging to Major Port/Govt or Semi Government Department/Autonomous or Public Section Organisation.
(2)	In case of recruitment by promotion/ deputation/transfer grades from which promotion/deputation/tran-	By promotion from Officers holding analogous posts with 5 years regular service in the post equivalent to Medical Officer/ Specia--list in any discipline or above in any Major Port Trust, failing which by transfer/deputation of Officers analogous posts in Government / Semi Government Organisations/Public Sector Undertaking or Autonomous bodies with 5 years regular service in the post.

8. The proposed amendment by the Board was not accepted by respondent no.1 exactly in the manner proposed, but respondent no.1 approved the proposed amendment with word '*or*' in between the words "*analogous posts"* and *"with five years"* and the Regulation carrying out the amendment in terms of Section 124 of the Major Port Trust Act, 1963, dated 25.06.2001 was published on the Gazette on the same date, the relevant portion reads as follows:-

In case of recruitment by promotion/deputation/transfer grades from which promotion/ deputation/transfer to be made	Promotion/transfer/deputation of:- Officers holding analogous posts or with five years regular service in the post equivalent to Dy.CE or above in any Major Port Trust failing which by transfer or deputation of officers holding analogous posts in Govt./ Semi-Govt. Organisation/Public Sector Undertaking or Autonomous bodies or with five years regular service in the post equivalent to Dy.CE of a Major Port Trust or above. The selection of post will be by merit for which bench mark in the overall grading in the Confidential Rolls should not be below "Very good". (Period of deputation should not ordinarily exceed 3 years.

9. The petitioner in terms of the said letter dated 11.05.2001, submitted his application for the said post of Chief Medical Officer under respondent no.2. Although respondent no.2 had proposed the amendments for the said recruitment rules, the same were published on the Gazette dated 25.06.2001 and came into force as stated on the Gazette itself from the date of publication of the said notification on the Gazette of India.

10. The respondent no.1 in their affidavit, filed through their Under Secretary, have stated that three applications were received including that of the petitioner, respondent no.3 and one Dr. J. Sarkar from Tuticorin Port Trust. In the said affidavit, it has been stated that the Board's Resolution dated 31.01.2001, which was sent to respondent no.1 for approval and notification in the Gazette of India, could not be notified due to typographical errors and considering that the Recruitment Rules were expected to be notified shortly, the Selection Committee, consisting of the Joint Secretary (Ports) of Ministry of Shipping, Acting Chairman of respondent no.2 and the Chief Medical Officer of Calcutta Port Trust, in its meeting held on 07.06.2001, considered the same and decided to give its recommendations on the basis of the Recruitment Rules as approved by

respondent no.1 and which were due to be sent for notification in the Gazette of India, which were later on notified on the Gazette of India dated 25.06.2001. As per respondent no.1, the said Selection Committee considered the said three applications and after going through their Educational Qualifications, Experience, ACR's, etc., recommended respondent no.3, Surgeon of respondent no.2, for appointment as the Chief Medical Officer of respondent no.2 and Orders were issued accordingly. As per respondent no.1, respondent no.3 has been appointed as the Chief Medical Officer of respondent no.2 as he meets the eligibility criteria as per the said Rules. As per the said Regulations (Rules of 2001, for short) namely the notification published on Gazette dated 25.06.2001, styled as Mormugao Port Trust Employees (Recruitment of Heads of Departments) (Amendment) Regulations, 2001, Medical Officers to be eligible should have held either a analogous post or should have had five years regular services in the post as Medical Officer/Specialist in any discipline in any Major Port Trusts. Respondent no.3/Dr. Azgaonkar, was found to have had 15 years experience as Surgeon with respondent no.2 and, therefore, was eligible as per the said Rules of 2001 and the petitioner having held an analogous post of Chief Medical Officer with New Mangalore Port Trust was also eligible and was considered but the Selection Committee preferred

respondent no.3 and, accordingly, recommended his appointment as Chief Medical Officer with respondent no.2. As per respondent no.1, there appears to have been some typographical mistake in the Circular dated 11.05.2001 of the Mormugao Port Trust and due to that reason, the word '*or*' rather should have been typed after '*analogous post*' in the Circular is missing and the petitioner ought to have confirmed the actual condition by representing through proper channel to the Chairman of the Mormugao Port Trust or to the concerned Ministry of respondent no.1. As per respondent no.1, the petitioner has tried to confuse the issue that a Surgeon could not be appointed as a Chief Medical Officer and that as per the criteria prescribed, a Surgeon is eligible for becoming Chief Medical Officer.

11. Admittedly, the petitioner was not eligible to be considered for the post of Chief Medical Officer with respondent no.2 as per the Mormugao Port Trust (Recruitment of Heads of Department)(Amendment) Regulations 2000, (Rules of 2000, for short) and when the said Regulations or Rules were in force, it is respondent no.3 alone, who was eligible for the said appointment. Therefore, it is obvious, that this is not a case where the appointment to the post of the Chief Medical Officer with respondent no.2, had to be done as per the existing Rules of 2000. Although the Selection

Committee of respondent no.1 considered the petitioner for the appointment of Chief Medical Officer on the assumption that the petitioner was holding a analogous post with New Mangalore Port Trust, this position is contested on behalf of respondent nos. 2 and 3 to which aspect, we will refer to, a little later.

12. The first aspect to be examined is, therefore, whether the respondent no.1 could have proceeded with the selection on the basis of the Rules of 2001 as approved by respondent no.1 and before their publication in the Official Gazette?

13. Admittedly, the Selection Committee constituted by respondent no.1, met on 07.06.2001, but the amended Rules of 2001 came to be published only on 25.06.2001 and, as already stated, the respondent no.1 proceeded with the selection process considering that respondent no.1 had already approved the said Rules and which were expected to be notified shortly.

14. There is no dispute that although it is respondent no.2 who had proposed the amendments, it is respondent no.1 who ultimately is the

authority in terms of Section 124 read with Section 132 of Major Port Trust Act, 1963, to frame the necessary Regulations/Rules for the appointment for the post of Chief Medical Officer and other posts. The petitioner's contention is that the Regulations/Rules published on Gazette dated 25.06.2001, could not have retrospective effect and, therefore, the selection if any, had to be done in terms of the Circular/letter dated 11.05.2001. It is not the petitioner's contention that the petitioner ought to have been considered in terms of Rules of 2000 for the petitioner knows too well that the petitioner was not eligible to be considered in terms of the said Rules.

15. On behalf of respondent no.2, reliance has been placed on ***Abraham Jacob & Ors. v. Union of India [(1998) 4 S.C.C. 65]*** and ***Vimal Kumari v. State of Haryana & Ors. [(1998) 4 S.C.C. 114)***, while on behalf of the petitioner, reliance has been placed on ***Union of India v. V. Ramakrishnan & Ors. [(2005) 8 S.C.C. 394)***, to show that there has been change of law from the time the first two cases were decided by the Apex Court.

16. In ***Abraham Jacob & Ors. v. Union of India*** (supra), what was stated by the Supreme Court was that since the statutory rule had not come

into force and therefore there was no illegality in giving promotion to the Junior Engineers based on administrative decision of the Government. In the case of ***Vimal Kumari v. State of Haryana & Ors.***(supra), it was observed by the Supreme Court that it was open to the Government to regulate the service conditions of the employees for whom the rules were made by those rules even in their draft stage provided there was clear intention on the part of the Government to enforce those rules in the near future. Recourse to such draft rules was permissible only for the interregnum to meet any emergent situation and if however the intention was not to enforce or notify the rules at all, recourse to draft rules could not be taken. In the case of ***Union of India v. V. Ramakrishnan & Ors***. (supra), the Hon'ble Supreme Court took note of the aforesaid two decisions wherein it was held that draft rules could be acted upon to meet urgent situations when no rule is operating. The Supreme Court also took note of another case of ***High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat [(2003) 4 S.C.C. 712]***, wherein it was observed that "*its now trite that draft rules which are made to lie in a nascent state for a long time cannot be the basis for making appointment or recommendation. Rules even in their draft stage can be acted upon provided there is a clear intention on the part of the Government to enforce those rules in the near future.*" and then

the Supreme Court in Para 28 observed that *valid rules made under proviso appended to Article 309 of the Constitution operate so long the rules are not repealed and replaced. The draft rules, therefore, could not form the basis for grant of promotion when Rules to the contrary are holding the field and it could be safely assumed that the principle* in the first three cases *that draft rules can be acted upon, will apply where there are no rules governing the matter and where recruitment is governed by departmental instruction or executive orders under Article 162 of the Constitution*. As already stated, in the case at hand, the selection of respondent no.3 was made after the Rules of 2001, were approved by the Central Government and pending their publication in the Official Gazette. The petitioner, as already stated, is not insisting that the petitioner ought to have been considered in terms of Rules of 2000, because the petitioner is fully aware that he was not eligible to be considered under the said Rules. In fact, the petitioner was considered in terms of the Rules, which were approved by the Central Government awaiting their publication on the Official Gazette and, in a situation like this, in our view, the ratio in the first three decisions referred to hereinabove, will have got to be followed since otherwise it is not the case of the petitioner that appointments ought to have been made under the Rules of 2000. The petitioner as well as respondent no.3 were considered

for the promotion and respondent no.3 was found to be more meritorious than the petitioner.

17. The petitioner's contention that the selection ought to have been made in terms of the Board Resolution dated 31.01.2001 or Board's Communication dated 11.05.2001, cannot be accepted for reasons more than one. The power to make appointments in terms of Section 24 of the Major Port Trust Act, 1963, has been conferred on the Central Government, and in fact, Section 24 of the Major Port Trust Act, 1963, provides that subject to the provisions of the Schedule for the time being in force, sanctioned by a Board under Section 23, the power of appointing any person to any Post, whether temporary or permanent, shall in the case of a post, the incumbent of which is to be regarded as the Head of a department, be exercisable by the Central Government after consultation with the Chairman. Section 124 of the Major Port Trust Act, 1963, makes a provision in respect to regulations, and, sub-section (1) thereof provides that no regulation made by the Board under this Act (other than a regulation made under, sub-section (2) of Section 17) shall have effect until it has been approved by the Central Government and until such approval has been published in the Official Gazette. If the power of appointment has

been entrusted to the Central Government and such power is to be exercised in terms of the regulations made by the Board, unless the regulations made by the Board, are approved by the Central Government, in our view, an appointment could not be made under the regulations made by the Board per se, unless the regulations are approved by the Central Government. Admittedly, what was approved by the Board in terms of the said resolution dated 31.01.2001 or as conveyed by letter dated 11.05.2001, was not approved by the Central Government. In other words, the regulation was approved by the Central Government with word "*or*" in between the words "*analogous post*" and "*with five years*" as has already been noticed, and therefore, no appointments could be made in the light of Section 124 of the Major Port Trust Act, 1963, unless the Regulation was approved with the words "*or*" after the words "*analogous post*" and before the words "*with five years regular service*" as can be seen from the Regulations published on Gazette dated 25.06.2001. Therefore, in our view, no appointment could have been made by the Central Government in terms of the resolution of the Board and/or letter dated 11.05.2001 unless the Central Government had approved the same and the Central Government approved the resolution of the Board with certain modifications including the one of which the reference had been made hereinabove. Secondly, although the Central

Government considered the petitioner to be holding an analogous post as that of the Chief Medical Officer with respondent no.2 and as stated by the Central Government in their affidavit filed through the Under Secretary dated 24.06.2002, before this Court, respondent nos. 2 and 3 have contested this position and, in our view, rightly. No doubt, the petitioner was holding the post of Chief Medical Officer with the New Mangalore Port Trust from 01.01.2001, in a scale of Rs.14500-18700. In terms of the definition of the analogous post given in the Regulations 2001, analogous post means a post of which the duties and level of responsibilities and/or the pay ranges are comparable to those of the post to which the selection is to be made. The selection was to be made to the Chief Medical Officer with respondent no.2, which was carrying a pay scale of Rs.17500-22300 and, therefore, it could not be that the duties and responsibilities of the said two posts were of the same level or their pay were comparable and, therefore, in our view, the petitioner did not qualify to be considered for selection to the post of Chief Medical Officer with the respondent no.2 because the post held by the petitioner was not analogous with the post of the Chief Medical Officer with respondent no.2. The petitioner could have been eligible to have been considered, if he had, five years regular service in the post equivalent to Medical Officer/Specialist in any discipline or above in any

Major Port Trust as contemplated by the Rules of 2001. It is pointed out on behalf of respondent nos. 2 and 3 that the petitioner was Medical Officer only from 16.03.1999 and in the absence of having completed five years, was not eligible to be considered. On behalf of the petitioner, it is submitted that in the Ports of Visakhapatnam, Chennai, etc., the designation of the ingress post to the medical services is of Medical Officers, which is equivalent to the post of Asst. Medical Officer in the establishment of respondent no.2 and the pay scale of the post of Asst. Medical Officer in the establishment of respondent no.2, is the same as that of Medical Officer in the aforesaid posts, the scale being Rs.9100-2050-15100 and that the petitioner had obtained particulars to this effect from the concerned Ports namely Visakhapatnam and Chennai and the petitioner is personally aware of the same. It is submitted on behalf of the petitioner that the respondents have not joined issue on the said averments in the petition at Para 8 of the petition and, therefore, the same have got to be accepted and the petitioner having worked as Asst. Medical Officer, with respondent no.2 for more than five years, which is equivalent to the post of Medical Officers in other Port Trusts was eligible to be considered for post of Chief Medical officer with respondent no.2. We are not inclined to accept the said submission. Firstly it must be stated that the Selection Committee did not consider the

petitioner because he had worked for five years as Medical Officer. The petitioner was considered because in the opinion of the Selection Committee, he was holding an analogous post. Secondly, the petitioner has produced no proof in support of his averments in Para 8 of the Petition. In this context, we may refer to the case of ***Bharat Singh & Ors. v. State of Haryana & Ors. (AIR 1988 Supreme Court 2181)***, wherein the Supreme Court has stated that when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter affidavit, as the case may be, the Court will not entertain the point. Therefore, what has been stated by the petitioner in Para 8, cannot be accepted for want of proof being produced by the petitioner in support of the said averments.

18. In our view, the petitioner was not eligible to be considered in terms of the Rules of 2000, was also not eligible as per Rules framed by respondent no.2 and communicated by letter dated 11.05.2001, as well as by the Rules of 2001, as approved and published by the Central

Government on Gazette dated 25.06.2001. If the petitioner was not eligible under Rules of 2000 or for that matter, under the Rules as framed by the Board and subsequently as approved and published by the Central Government, then comes the question of the very locus standi of the petitioner to challenge the selection and appointment of respondent no.3, notwithstanding the fact that the petitioner was considered by respondent no.1 on a wrong assumption that the petitioner was holding a post analogous to the post to which the selection was to be made. In this context, we may refer to the case of ***Dr. Umakant Saran v. State of bihar (AIR 1973 S.C. 964)***, wherein the Hon'ble Supreme Court has stated that in order that mandamus may be issued to compel the authorities to do something it must be shown that the Statute imposes a legal duty and the aggrieved party had a legal right under the Statute to enforce its performance and if the petitioner was not eligible for appointment, he could not be considered to be as aggrieved for the purpose of issuing a mandamus. Only because the petitioner was wrongly considered by the Selection Committee, that cannot give any right to the petitioner to challenge the selection process, when the petitioner was not eligible to be considered.

19. In our view, the petitioner was not eligible to be considered

either under the Rules 2000 or the Rules framed by respondent no.2 or under the Rules as approved by the Central Government and, therefore, the petitioner for reasons indicated hereinabove, had no locus standi to file the present petition. As a result, the petition fails and is hereby dismissed with costs to respondent no.3. Rule discharged.

A. P. LAVANDE, J.

N. A. BRITTO, J.

arp/*